91-1355

No. .....

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. ARON & COMPANY,

Petitioner,

v.

LEO HAVILAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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February 24, 1992

Question Presented

Respondent, a former employee of a New York Stock Exchange ("NYSE") member organization, brought identical employment-related claims against his former employer and against petitioner, his former employer's affiliate, in the United States District Court for the Southern District of New York. The District Court ruled that respondent, who was an NYSE registered representative, was required to arbitrate his claims against his former employer, pursuant to the Federal Arbitration Act ("FAA") and NYSE rules. The District Court held, however, that the same employment-related claims against respondent's former employer's affiliate were not arbitrable. A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The question presented for review, which has divided the Courts of Appeals, is:

> Whether the FAA permits an NYSE registered representative to avoid his commitment to arbitrate employment-related claims against his employer by asserting those claims in federal or state court against an affiliate of his employer that is not a member of the NYSE?

List of Parties and Rule 29.1 Statement

The parties to the proceedings below were petitioner J. Aron & Company, Goldman, Sachs & Co., and respondent Leo Haviland. On January 9, 1992, a stipulation and order was entered by the District Court dismissing the complaint against Goldman, Sachs & Co. with prejudice.

The parent company of petitioner J. Aron & Company is The Goldman Sachs Group, L.P. The only subsidiary of J. Aron & Company that is not wholly owned is J. Aron & Company (Singapore) PTE.

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IN THE

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OCTOBER TERM, 1991

No. 91-

J. ARON & COMPANY,

Petitioner,

v.

LEO HAVILAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner J. Aron & Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on October 16, 1991.

Opinions Below

The opinion of the Second Circuit is reported at 947 F.2d 601, and is reprinted in the appendix hereto at pages A1 through A25.

The opinion of the United States District Court for the Southern District of New York (Sand, D.J.) is reported at 736 F. Supp. 507, and is reprinted in the appendix hereto at pages A27 through A36.

Jurisdiction

The judgment of the Second Circuit was entered on October 16, 1991. A petition for rehearing, with suggestion for rehearing *in banc*, was denied on November 26, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes and Rules Involved

Section 3 of the Federal Arbitration Act ("FAA") provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1988).

This case also involves the following rules of the New York Stock Exchange ("NYSE"): (1) Rule 347, which requires the arbitration of any dispute between a registered representative and a member organization "arising out of the employment or termination of employment of such registered representative;" and (2) Rule 600(a), which requires the arbitration of any dispute between a non-member and an associated person arising "in connection with the business of such member . . . and/or associated person in connection with his activities as an associated person." These rules are reprinted in the appendix hereto at pages A40 and A41, respectively.

Statement of the Case

The question presented by this petition is of considerable importance to the securities industry. Since 1958, employment-related disputes involving NYSE registered representatives have been arbitrated. Just last Term, in holding that the exact agreement signed by respondent here required arbitration of employment claims by a registered representative against an NYSE member, this Court affirmed that NYSE arbitration protects the interests of both employers and employees in the securities industry and permits disputes to be resolved more quickly, informally, and inexpensively than litigation. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1654-55 (1991).

As a result of the Second Circuit's decision, which was by a divided panel (Mahoney, C.J., and McKenna, D.J., with Walker, C.J., dissenting), registered representatives of NYSE member firms whose responsibilities do not involve securities trading on the NYSE may circumvent their prior commitment to arbitrate employment claims by bringing actions against their employers' non-member affiliates in federal or state court, even if they are required to arbitrate those same claims against their employers.[1] More than fifty NYSE members, including all major firms, have non-member affiliates. (A42-A43).

The Second Circuit refused to apply the plain language of NYSE Rule 600(a), which requires arbitration of any dispute between a non-member and an associated person arising "in connection with the business of such member . . . and/or associated person in connection with his activities as an associated person." Its decision is plainly contrary to the strong

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[1] For example, registered representatives of Shearson Lehman Brothers, Inc., relying on the Second Circuit's decision, might try to circumvent NYSE arbitration simply by naming as an alternative or additional defendant Shearson's non-member parent, American Express Company.

federal policy favoring arbitration recognized by this Court in a series of recent decisions and the approach followed by other circuits in interpreting NYSE rules. The other circuits have uniformly interpreted the terms of NYSE rules literally and, when the language of a rule is ambiguous or unclear (not the case here), have resolved any doubts in favor of arbitration.

The Second Circuit has created a square conflict between itself and the D.C. Circuit with respect to the arbitrability of claims against an employer's non-member affiliate under Rule 600(a) of the NYSE. According to the Second Circuit's narrow interpretation, Rule 600(a) requires arbitration of employment-related disputes involving an employer's non-member affiliate only if the employee actually traded securities on the NYSE itself. 947 F.2d at 605-07 (A11-A16). The decision below is an unwarranted extension of the requirement — found nowhere in the text of Rule 600(a) and announced by the Second Circuit in *Paine, Webber, Jackson & Curtis, Inc.* v. *Chase Manhattan Bank, N.A.*, 728 F.2d 577, 580 (2d Cir. 1984) — that such disputes be "exchange-related."

By contrast, in *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826, 830 (D.C. Cir. 1987), the D.C. Circuit held that NYSE Rule 600(a) applies to employment disputes involving a non-member affiliate so long as the employee's claims arose out of his or her activities as an employee of an NYSE member firm. The D.C. Circuit rejected the narrow interpretation adopted by the Second Circuit below, stating that there is "no basis for limiting the meaning of Rule 600 specifically to activities involving customer accounts or to broker-dealer functions." *Id.* at 831-32. Indeed, in his dissent below, Judge Walker argued that *Pearce* "require[s] us to hold that Haviland's claims against J. Aron are connected to Haviland's activities as an associated person and thus arbitrable." 947 F.2d at 609 (A20).

Because the NYSE and the large majority of investment banking firms and broker-dealers are located in the Second

Circuit, the decision below will have a disproportionate impact on NYSE arbitration as a means of resolving disputes in the securities industry. Unless corrected, this decision threatens substantially to undermine the effectiveness of NYSE arbitration and to shift many employment disputes into already overburdened federal and state courts without any countervailing benefit to the interests of justice.

The Facts

Respondent Leo Haviland joined Goldman, Sachs & Co. ("Goldman Sachs") in 1979 and was a vice president when he was terminated in early 1989. Goldman Sachs is a registered broker-dealer. Petitioner J. Aron & Company is an affiliate of Goldman Sachs, which has the same ownership as Goldman Sachs, and which engages primarily in proprietary trading of commodities and currencies. Goldman Sachs is a member of the NYSE; petitioner is not.

In 1981, respondent registered as a securities representative with several organizations, including the NYSE. His registration application — called a Form U-4 — contained, among other things, his agreement "to arbitrate any dispute, claim or controversy" arising between him and Goldman Sachs "or any other person" that "is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." (A38).

Rule 347 of the NYSE requires the arbitration of any dispute between a registered representative, such as respondent, and a member organization, such as Goldman Sachs, "arising out of the employment or termination of employment of such registered representative." (A40). Rule 600(a) of the NYSE similarly requires the arbitration of any dispute between an "associated person" and a non-NYSE member arising out of the associated person's business and/or activities as an associated person. (A41). It is undisputed that respondent was an "associated person" for purposes of Rule

600(a) by virtue of his employment as an officer of Goldman Sachs. 736 F. Supp. at 510 (A33).

The Proceedings Below

In December 1989, more than ten months after his employment with Goldman Sachs was terminated, respondent brought suit in the Southern District of New York against both Goldman Sachs and petitioner.[2] Respondent alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as common law fraud, based on his assertions that (i) he had remained in Goldman Sachs' employ, foregoing other unspecified employment opportunities, in reliance on allegedly false statements by Goldman Sachs and petitioner that confidential information concerning trading by clients of Goldman Sachs would not be revealed to petitioner, and (ii) he was foreclosed from compensation increases and later terminated by Goldman Sachs because he refused to disclose confidential client information to petitioner.

In January 1990, Goldman Sachs and petitioner moved under Section 3 of the FAA for an order staying all judicial proceedings pending arbitration. They asserted that NYSE Rule 347 required respondent to arbitrate his claims against Goldman Sachs, because the dispute arose out of his employment or the termination of his employment, and that NYSE Rule 600(a) similarly required respondent to arbitrate his claims against petitioner, because those claims arose in connection with his activities as an associated person, *i.e.*, as an officer of Goldman Sachs.

The District Court granted Goldman Sachs' motion for a stay, explicitly adopting a "broad interpretation of the scope of NYSE Rule 347." 736 F. Supp. at 510 (A33). The District Court denied petitioner's motion, however, on the ground that

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[2] The jurisdiction of the District Court was invoked under 18 U.S.C. §§ 1962 (c) and (d) and 28 U.S.C. § 1331.

Rule 600(a)'s reference to disputes concerning "activities as an associated person" should be construed narrowly to cover only claims of associated persons who actually trade securities on the NYSE. *Id.* at 510-11 (A35).

On appeal, a divided panel of the Second Circuit affirmed the District Court's denial of petitioner's motion for a stay. The majority stated that Rules 347 and 600(a) are not co-extensive, that Rule 600(a) applies only to controversies arising out of an associated person's "exchange-related business," and that because respondent did not execute trades on the NYSE, his claims did not arise out of exchange-related business. 947 F.2d at 602, 605-07 (A4, A11-A16). The majority also did not deem the NYSE's "interest in the reputational aspects of the dispute" sufficient to meet the "exchange-related" test. *Id.* at 607 (A15).

In dissent, Judge Walker argued that "the language of Rule 600(a) plainly covers this dispute." *Id.* at 608 (A17). According to Judge Walker,

> the essence of Haviland's claims . . . is that the defendants J. Aron and Goldman engaged in misconduct that affected Haviland's employment. Resolution of this dispute with J. Aron will involve evaluating Goldman's treatment of Haviland, including reduction in salary and termination, as well as an evaluation of Haviland's performance for Goldman (and Goldman affiliates) as a Goldman employee. It is undisputed that the issue of Haviland's responsibility to protect his Goldman clients falls squarely within the scope of his duties as an "associated person."

Id. at 609 (A20). Judge Walker also thought that respondent's claims, which concern the employment practices of an NYSE member organization and the responsibilities and performance of an associated person, were sufficiently "exchange-related" to require arbitration under Rule 600(a). *Id.* at 610-11 (A23).

Reasons for Granting the Writ

I.

The Second Circuit's Decision Is Contrary to the Strong Federal Policy Favoring Arbitration.

This Court has emphasized that the FAA establishes a "'federal policy favoring arbitration,'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1652 (1991) (quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and has repeatedly rejected attempts to circumvent arbitration agreements by bringing suit in federal or state court, *see Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984).

In light of this strong federal policy favoring arbitration, this Court has held that lower courts must "'rigorously enforce agreements to arbitrate,'" *McMahon*, 482 U.S. at 226 (quoting *Byrd*, 470 U.S. at 221), and has admonished that any doubts concerning the scope of arbitrable issues "should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability," *Moses H. Cone*, 460 U.S. at 24-25; *see also Mitsubishi Motors Corp.*, 473 U.S. at 626 ("as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

Rule 600(a) — which respondent indisputably submitted to when he became a registered representative — must be read in light of this policy. Accordingly, it must be interpreted literally and, to the extent that the rule is considered at all unclear or

ambiguous, any doubts must be resolved in favor of arbitration. As Judge Walker observed in his dissent below, the Second Circuit's "narrow view of Rule 600(a)'s coverage is out of step with the strong federal policy favoring arbitration." 947 F.2d at 611 (A24).

Absent this Court's review, the Second Circuit's decision invites registered representatives to attempt to avoid their obligation to arbitrate employment disputes with their employers, by suing their employers' non-member affiliates. It also threatens to remove employment-related claims against NYSE member firms from the forum best suited for handling them and to burden unnecessarily federal and state courts. The federal policy favoring arbitration is strongest "where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry." *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987). That is surely the case with NYSE arbitration. *See Gilmer*, 111 S. Ct. at 1654-55 (NYSE arbitration rules provide protections against biased panels, allow for appropriate discovery, and require award decisions to be in writing and made available to the public); *McMahon*, 482 U.S. at 234 ("the SEC has specifically approved the arbitration procedures of the New York Stock Exchange").

II.

This Case Presents a Question upon Which the Courts of Appeals Are Sharply Divided.

The courts of appeals have repeatedly held that the strong federal policy favoring arbitration as expressed in the FAA requires that any doubt concerning arbitrability under the rules of the NYSE must be resolved in favor of arbitration. *See Pearce*, 828 F.2d at 829; *McGinnis* v. *E.F. Hutton & Co.*, 812 F.2d 1011, 1013 (6th Cir.), *cert. denied*, 484 U.S. 824 (1987);

Zolezzi v. *Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1987); *Barrowclough* v. *Kidder, Peabody & Co.*, 752 F.2d 923, 937-38 (3d Cir. 1985); *Morgan* v. *Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984).

As Judge Walker stated in his dissent below, the plain language of Rule 600(a) encompasses respondent's employment-related claims against petitioner. 947 F.2d at 608 (A17). This fact alone would be sufficient in the D.C., Third, Sixth, Eighth, and Ninth Circuits to require arbitration under the rules of the NYSE. *See*, *e.g.*, *McGinnis*, 812 F.2d at 1014 (reliance on plain language of NYSE arbitration provisions); *Morgan*, 729 F.2d at 1167 (same).

Ignoring the plain language of Rule 600(a), the Second Circuit ruled that respondent's employment-related claims against petitioner were not subject to arbitration, even though the same claims against his employer were arbitrable. In its prior decision in *Paine Webber*, 728 F.2d at 580, a 1984 decision predating this Court's most recent decisions endorsing arbitration, the Second Circuit had limited the scope of Rule 600(a) to controversies arising out of the associated person's "exchange-related" business, even though this requirement is not found anywhere in the text of Rule 600(a). Here, it went even further and, contrary to the D.C. Circuit's decision in *Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987), significantly curtailed the meaning of "exchange-related" business. 947 F.2d at 605-07 (A11-A16).

Because respondent did not execute trades on the NYSE, *id.* at 602 (A4) (he instead traded "on various commodities exchanges, including the International Petroleum Exchange in London"), the Second Circuit held that his dispute with petitioner was not exchange-related and, hence, not subject to arbitration. The Second Circuit reasoned that a contrary construction of Rule 600(a) would do injustice to respondent's reasonable expectations as an associated person by requiring him, at the insistence of any non-member such as petitioner, to

submit to NYSE arbitration "'every dispute [he] has with any entity in the world, no matter what the subject matter.'" *Id.* at 605 (A11) (quoting *Paine Webber*, 728 F.2d at 580).

The Second Circuit's interpretation of Rule 600(a) squarely conflicts with the D.C. Circuit's construction of that rule in *Pearce*, 828 F.2d at 831-32. As Judge Walker recognized in his dissent, *Pearce* "require[s] us to hold that Haviland's claims against J. Aron are connected to Haviland's activities as an associated person and thus arbitrable." 947 F.2d at 609 (A20).[3]

The plaintiff in *Pearce*, a branch manager for an NYSE member organization, sued his member employer and its non-member affiliate for defamation. In finding plaintiff's claims against both the member and its non-member affiliate to be arbitrable, the D.C. Circuit held that the plaintiff was an "associated person," and that his claims were arbitrable because they arose in connection with his activities as a branch manager. 828 F.2d at 830. The D.C. Circuit applied the "exchange-relatedness" test enunciated by the Second Circuit in *Paine Webber*, but interpreted it expansively, in accordance with the FAA. The D.C. Circuit ruled that employment claims of an employee of a member organization were sufficiently tied to NYSE interests to be arbitrable under Rule 600(a). *Id.*

The D.C. Circuit also rejected any notion that the claims had to relate to customer relations or actual trades on the

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[3] The Second Circuit plainly deviated from the law as it exists in other circuits by not resolving any ambiguity it perceived in favor of arbitration. *See, e.g., Zolezzi*, 789 F.2d at 1450-51 (finding claims to be arbitrable under NYSE Rule 347 in view of "the federal policy of resolving ambiguities in favor of arbitrability of disputes"); *Morgan*, 729 F.2d at 1168 ("While we recognize that this conclusion is not free from debate, the Supreme Court's mandate that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' must be observed.") (citation omitted).

NYSE. *Id.* at 830-31 ("The Exchange's interest in its member firms' business practices surely extends beyond their handling of customer accounts."). Indeed, it expressly refused to limit Rule 600(a) "to activities involving customer accounts or broker-dealer functions." *Id.* at 831-32. According to Judge Walker, the D.C. Circuit "reached [the] conclusion [that the claims should be arbitrated] notwithstanding the fact that Pearce's duties did not involve trading on the New York Stock Exchange." 947 F.2d at 609 (A19).

In construing Rule 600(a), the D.C. Circuit was faithful to the text of that rule and to the policies underlying it. There is no danger that respondent, under the D.C. Circuit's reading of Rule 600(a), would have "to submit to exchange arbitration every dispute [he] has with any entity in the world, no matter what the subject matter," for Rule 600(a) expressly limits an associated person's duty to arbitrate to those disputes that arise "in connection with his activities as an associated person." Respondent would be obligated therefore to arbitrate only those controversies arising in connection with his conduct as an officer of Goldman Sachs. In addition, respondent's "reasonable expectations" would not be defeated by requiring him to arbitrate what is, quite literally, a dispute arising out of his employment at Goldman Sachs.

It is equally clear that respondent's claims against petitioner are sufficiently "exchange-related" to be arbitrable under Rule 600(a). The Second Circuit itself acknowledged in *Paine Webber* that "the substantial interest of the exchange in the sound and proper management of its member firms" justified the submission of a dispute to NYSE arbitration. 728 F.2d at 581. *See also Pearce*, 828 F.2d at 830 ("As an association of member firms, . . . the Exchange expresses each firm's interest that every other member conduct its business in a manner that inspires and warrants public confidence in all members."). Respondent's complaint alleges that Goldman Sachs, an NYSE member, attempted to intimidate an employee into divulging confidential information about the trading plans

of its clients, while fraudulently reassuring those same clients that the information would be kept secret. As Judge Walker said in dissent, it is hard to imagine an accusation in which the NYSE would have more interest. 947 F.2d at 610 (A23).

Conclusion

Because much of the U.S. securities industry is located in New York City, the Second Circuit's decision will have a more significant impact than is normally the case when a single circuit renders a decision that is out of line with the other circuits. This Court should grant certiorari to make clear that the strong federal policy favoring arbitration requires that any doubt concerning NYSE arbitrability be resolved in favor of arbitration and to resolve the conflict that now exists among the courts of appeals as to whether registered representatives may avoid arbitration by suing the affiliates of their employers. Absent review by this Court, the decision below may result in a flood of litigation in federal and state courts that should be resolved by NYSE arbitration.

Respectfully submitted,

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Of Counsel

February 24, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 285 — August Term, 1990
(Argued: October 11, 1990 Decided: October 16, 1991)
Docket No. 90—7460

LEO HAVILAND,

Plaintiff-Appellee,

— against —

GOLDMAN, SACHS & CO.,

Defendant,

J. ARON & COMPANY,

Defendant-Appellant.

Before:

MAHONEY and WALKER, *Circuit Judges,*
and MCKENNA,* *District Judge.*

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* The Honorable Lawrence M. McKenna, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, entered May 8, 1990 that denied defendant-appellant's motion for an order staying all proceedings pending arbitration before the New York Stock Exchange. The district court ruled that plaintiff-appellee's claim did not arise out of plaintiff-appellee's exchange-related activities, and therefore was not subject to arbitration under New York Stock Exchange Rule 600(a). *See Haviland v. Goldman, Sachs & Co.*, 736 F. Supp. 507 (S.D.N.Y. 1990).

Affirmed. Judge Walker dissents in a separate opinion.

GANDOLFO V. DIBLASI, New York, New York (Theodore O. Rogers, Jr., Thomas J. Witt, Sullivan & Cromwell, New York, New York, of counsel), *for Defendant-Appellant.*

JUDD BURSTEIN, New York, New York (Jay Goldberg, P.C., New York, New York, of counsel), *for Plaintiff-Appellee.*

MAHONEY, *Circuit Judge*:

Plaintiff-appellee Leo Haviland commenced this action in the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, against his former employer, defendant Goldman, Sachs & Co. ("Goldman"), and its affiliate, defendant-appellant J. Aron & Company ("Aron"), alleging injury caused by a pattern of racketeering activity and common law fraud.

Defendants countered with a motion, pursuant to Section 3 of the Arbitration Act (title 9 of the United States Code),

9 U.S.C. § 3 (1988), to stay all proceedings pending arbitration before the New York Stock Exchange (the "Exchange"). They based their motion upon an application for securities industry registration executed by Haviland on September 28, 1981 in which he agreed to arbitrate certain disputes under the "rules, constitutions, or by-laws" of, *inter alia*, the Exchange, and upon Exchange Rules 347 and 600.

In an opinion and order entered May 8, 1990, the district court granted the motion to stay the claims asserted against Goldman, but denied the motion to stay the identical claims asserted against Aron. The court granted the motion as to Goldman pursuant to Exchange Rule 347, which governs the arbitrability of disputes between Exchange registered representatives and Exchange members arising out of a registered representative's employment or termination of employment. *See Haviland*, 736 F. Supp. at 509-10. The court denied the motion as to Aron pursuant to Exchange Rule 600(a), which governs the arbitrability of disputes between persons associated with Exchange members and nonmembers. *See id.* at 510-11.

On appeal, Aron contends that the district court misconstrued the law of this circuit to require that disputes falling within Rule 600(a) arise out of exchange-related activity. According to Aron, our case law establishes that where employment claims by an associated person must be arbitrated under Rule 347, the same claims against the member firm's affiliate must be arbitrated under Rule 600(a).

We affirm the order of the district court.

Background

Leo Haviland was employed by Goldman on May 22, 1979, and remained an employee until Goldman terminated his employment on January 31, 1989. Goldman is an investment banking firm, a registered broker-dealer, and a member organization of numerous securities exchanges, including the Exchange.

Haviland became head of Goldman's Energy Futures and Options Group in 1982, and a Goldman vice president in 1984. Thereafter until the termination of his employment, Haviland was a vice president in charge of energy futures. In that role, Haviland traded energy futures (contracts to buy or sell a quantity of a form of energy), and options on energy futures on behalf of refining and marketing firms, trading companies, and energy producers. Haviland never executed this trading on the Exchange, but rather on various commodities exchanges, including the International Petroleum Exchange in London.

In 1984, the Goldman partners entered the energy market as principals through their proprietary investment vehicle, Aron. Aron, a partnership, is an affiliate of Goldman with the same ownership (i.e., the general partners of Aron and Goldman are identical). Through Aron, the Goldman partners invest their own capital in various commodities and foreign exchange.

Haviland's claims are based upon Aron's entry into the energy market. Haviland asserts that upon that entry, the confidential information he acquired regarding the trading, purchase, and sale plans of his clients became of great value to Aron. According to Haviland, in response to the concern he expressed regarding the continued confidentiality of this

information, defendants falsely assured him, from April 1984 to the spring of 1987, that it would be zealously safeguarded against disclosure, particularly to Aron. Haviland alleges that these representations defrauded him into continuing in the employ of Goldman, and that various innocent repetitions of these representations by Haviland, as well as representations made directly by Goldman to clients, amounted to mail fraud in violation of 18 U.S.C. § 1341 (1988), wire fraud in violation of 18 U.S.C. § 1343 (1988), and common law fraud.

Haviland further alleges that from July 1987 through January 1989, defendants attempted to extort him into divulging confidential client information in violation of 18 U.S.C. § 1951 (1988). Haviland claims that because he refused to divulge this information, he was denied appropriate salary increases and eventually summarily dismissed. Premised upon these allegations, Haviland brought identical claims against Goldman and Aron for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d) (1988), and common law fraud.

Haviland filed his complaint on December 20, 1989. Defendants moved on January 25, 1990, pursuant to 9 U.S.C. § 3 (1988), for an order staying all proceedings pending the outcome of arbitration. The defendants based their motion upon Haviland's execution, on September 28, 1981, of a "Uniform Application for Securities Industry Registration," known as a Form U-4. The signature page of the Form U-4 contains the following provision:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under

the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

In response to question 8 of the U-4, Haviland applied for registration with the Exchange, the American Stock Exchange and the National Association of Securities Dealers, and became a registered representative of Goldman for the Exchange on October 23, 1981. He continued in this position throughout his employment at Goldman. The quoted agreement in Haviland's U-4 application thus incorporates by reference the arbitration provisions of the Exchange's rules, constitution, and by-laws.

As an Exchange member, Goldman invoked Exchange Rule 347, which is entitled "Controversies As to Employment or Termination of Employment," and provides:

> Any controversy *between a registered representative and any member or member organization arising out of the employment or termination of employment* of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

N.Y.S.E. Rule 347 (revised to Feb. 1, 1990) (emphasis added).

Aron, a non-member, relied upon Exchange Rule 600(a), which is entitled "Arbitration," and states:

> Any dispute, claim or controversy *between a* customer or *non-member and* a member, allied member, member organization and/or *associated person arising in connection with the business of such* member, allied member, member organization and/or *associated person in connection with his activities as an associated person* shall be arbitrated under the Constitution and Rules of

> the [Exchange] as provided by any duly executed and enforceable written agreement or *upon the demand of the* customer or *non-member*.

N.Y.S.E. Rule 600(a) (revised to Feb. 1, 1990) (emphasis added).

It is undisputed that Haviland is a "registered representative" within the meaning of Rule 347, an "associated person" within the meaning of Rule 600(a), that Goldman is a "member" or "member organization" within the meaning of both rules, and that Aron is a "non-member" within the meaning of Rule 600(a). *See Haviland*, 736 F. Supp. at 508.

The district court ruled that Haviland's dispute with Goldman fell within the terms of Rule 347, concluding that his claims against Goldman arose out of his employment or termination of employment. *See id.* at 509-10. Applying the broad interpretation of Rule 347 that we adopted in *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989), the court determined that because Haviland's dispute "'"involve[s] significant aspects of the employment relationship,"'" the dispute is subject to compulsory arbitration. *Haviland*, 736 F. Supp. at 509 (quoting *Fleck*, 891 F.2d at 1053 (quoting *Morgan v. Smith, Barney, Harris, Upham & Co.*, 729 F.2d 1163, 1167 (8th Cir. 1984))).

The district court denied Aron's arbitration claim, on the other hand, relying upon our ruling in *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577 (2d Cir. 1989), that the scope of Rule 600(a) "'should be limited, at least in cases . . . in which the alleged improper conduct is on the part of the non-member, to controversies arising out of the member's exchange-related

business.'" *Haviland*, 736 F. Supp. at 510 (quoting *Paine*, 728 F.2d at 580). The court concluded that Haviland's claims against Aron do not arise out of exchange-related business and hence are not subject to compulsory arbitration. *Id.* at 510-11. In reaching that result, the court rejected Aron's contention that our decision in *Fleck*, 891 F.2d at 1054, established that the scope of Rule 600(a) is identical to that of Rule 347. *Id.* The court noted the prior representation of Haviland's counsel that Haviland would discontinue his claims against Goldman in the event of a ruling (as subsequently occurred) that those claims were arbitrable, but the claims against Aron were not. *Id.* at 511.

This appeal followed.

Discussion

We have jurisdiction over this timely appeal pursuant to Section 16(a)(1)(A) of the Arbitration Act, 9 U.S.C. § 16(a)(1)(A) (1988), which provides for appellate review "of an order refusing a stay of any action under Section 3 of this title." We review *de novo* the denial of a motion to stay an action pending arbitration. *See McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987).

We emphasize, at the outset, that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also New York News Inc. v. Newspaper Guild*, 927 F.2d 82, 84 (2d Cir. 1991).

Accordingly, we may conclude that Haviland undertook the obligation to arbitrate his dispute with Aron only if we find that the dispute lies within the scope of the U-4 agreement that he signed and the Exchange arbitration provisions which it incorporates by reference. *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 112 (2d Cir. 1990) ("Applying general principles of contract law, we begin our analysis with the customer agreement signed by Georgiadis."); *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 193 (2d Cir. 1984) ("The scope of an arbitration clause, like any contract provision, is a question of the intent of the parties.").

In conducting this analysis, however, "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). This axiom flows from the "'federal policy favoring arbitration,'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone*, 460 U.S. at 24), established by the Arbitration Act. *See id.* at 225-26.

By way of synthesis, we note that the purpose of the Arbitration Act is "'to make arbitration agreements as enforceable as other contracts, but not more so.'" *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). We have repeatedly observed, therefore, that "'federal policy alone cannot be enough to extend the application of an arbitration clause far beyond its intended scope.'" *McDonnell Douglas*, 858 F.2d at 831

(quoting *Fuller v. Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977)); *see also New York News*, 927 F.2d at 84 (federal policy favoring arbitration cannot deprive party of benefit of its bargain to limit circumstances under which it must arbitrate).

With these principles in mind, we address the contentions presented on this appeal. The crux of Aron's position is that the district court misconstrued the law of this circuit to require that disputes falling within Rule 600(a) arise from an associated person's exchange-related activity (at least when the alleged improper conduct is attributed to the nonmember party to the dispute), and that in doing so the court construed *Paine* too expansively and *Fleck* too restrictively. According to Aron, *Fleck* establishes that in employment-related cases, Rule 347 and Rule 600(a) are coextensive. Thus, Aron insists that *Fleck*, not *Paine*, governs the arbitrability of its dispute with Haviland and mandates arbitration of that dispute, just as Rule 347 mandates arbitration of the dispute between Haviland and Goldman. We disagree.

In *Paine*, plaintiff, an Exchange member, brought suit against a nonmember bank and a former employee of the bank alleging that they fraudulently misled plaintiff into extending credit to a third party, resulting in a $1.5 million loss. 728 F.2d at 578-79. The defendants moved to compel arbitration pursuant to the constitution and rules of the Exchange. *Id.* at 579. We affirmed the district court's denial of that motion, holding that:

> The arbitration provisions found in the Exchange Constitution and Rules governing member-non-member controversies should be limited, at least in cases such as the instant one in which the alleged improper conduct is

> on the part of the non-member, to controversies arising out of the member's exchange-related business.

Id. at 580.

This construction of Rule 600(a), in our view, faithfully reflects the reasonable expectations of those who commit themselves to be bound by it. As we observed in *Paine*:

> [A]ny rule extending the arbitration provisions to controversies not arising out of exchange-related business would do significant injustice to the reasonable expectations of exchange members. Such a rule would require every exchange member, at the insistence of a non-member, to submit to exchange arbitration every dispute it has with any entity in the world, no matter what the subject matter.

Id. We note in this regard that in the absence of an "enforceable written agreement" calling for arbitration, Rule 600(a) authorizes only the nonmember, and not the Exchange insider (member, allied member, member organization, or associated person), to demand arbitration. It seems inconsistent with the reasonable intention of the Exchange insider to extend this unilateral advantage to the nonmember outside the field of exchange-related activities.

We note also that the language of Rule 600(a) dictates a somewhat narrower construction of the duty assumed by an associated person relative to that assumed by an Exchange member. Rule 600(a) defines a member's duty to arbitrate to extend to those disputes with nonmembers "arising in connection with the business of such member"; it defines an associated person's duty to extend only to those disputes with nonmembers "arising in connection with the business of such . . . associated person in connection with his activities as an associated person." This indicates that the associated

person's "activities" are narrower than his "business," thus requiring a more restrictive construction of the duty assumed. Accordingly, we conclude that the exchange-relatedness requirement that we held in *Paine* to condition a member's duty to arbitrate applies *a fortiori* to the duty assumed by an associated person.[1]

In so ruling, we reject Aron's contention that *Fleck*, rather than *Paine*, governs the disposition of this case. In *Fleck*, plaintiff, an Exchange registered representative, sued both his former employer E.F. Hutton & Co., Inc. (the "Company"), an Exchange member organization, and the former employer's affiliate, E.F. Hutton Group (the "Group"), a nonmember, asserting identical post-termination defamation claims against each defendant. *Fleck*, 891 F.2d at 1048-50. We ruled that those claims asserted against the Company, a former employer, involving "significant aspects of the employment relationship" were subject to compulsory arbitration under Rule 347, a ruling upon which the district court relied in granting Goldman's arbitration claim under Rule 347. *Id.* at 1050-53.

We also ruled that under Rule 600(a), the claims asserted against the nonmember Group were subject to arbitration. Aron contends that in so ruling, *Fleck* establishes that the scope of Rule 347 and Rule 600(a) are coterminous, pointing to the following language in *Fleck*:

> To be arbitrable, Fleck's claims must have arisen "in connection with [his] business [or] in connection with his

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1 Consistent with *Paine*, 728 F.2d at 580 & n.5, we confine our ruling to situations in which the alleged misconduct is attributed to the non- member. *Cf. Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 832 (D.C. Cir. 1987) (*Paine* limitation inapplicable when associated person assertedly engaged in misconduct).

> activities as an associated person." Rule 600(a). We hold that *the dispute with the Group is arbitrable to the same extent as the dispute with the Company; matters that arose in connection with Fleck's activities as an associated person would also arise in connection with his employment under Rule 347. See Pearce* (allowing defendant, the Hutton Group, to use Rule 600(a) to arbitrate an ex-employee's claim that he was defamed by statements made about his activities as an associated person); *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577 (2d Cir. 1984) (refusing to let defendant, who was not a NYSE member, arbitrate a non-exchange related fraud claim under Rule 600(a)).

891 F.2d at 1054 (emphasis added).

We do not accept Aron's reading of *Fleck*. Rather, we agree with the district court "that rather than stating a general rule about the scope of Rule 600(a), the [language from *Fleck* emphasized in the above quotation] referred only to the facts in that case where the exchange-relatedness of the conduct was not at issue." *Haviland*, 736 F. Supp. at 510; *cf. Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972) (contrasting breadth of Exchange arbitration clause for disputes between members with provision governing disputes between member and nonmember, which must arise out of business of member); N.Y.S.E. Const. art. XI, § 1 (revised to Feb. 1, 1990) (making same distinction).

The statements at issue in *Fleck* referred to Fleck's character and performance as a stockbroker. *See Fleck*, 891 F.2d at 1049. As in *Pearce*, furthermore, although the former employee sued in defamation, the issue of the truth of the defamation turned upon the asserted misconduct of the

employee, not the nonmember. *Pearce* explicitly distinguished *Paine* on this basis. *See Pearce*, 828 F.2d at 832; *see also supra* note 1. Finally, it would be more than anomalous to read *Fleck* as overruling the holding of *Paine sub silentio* in a passage in which *Fleck* cites *Paine* with approval.

In its reply brief, and more emphatically at oral argument, Aron contended that even accepting the *Paine* ruling that arbitration may be demanded by a nonmember only as to controversies arising out of exchange-related business, *see Paine*, 728 F.2d at 580, Haviland's dispute with Aron should be subject to arbitration because it has the potential to reflect discredit upon Goldman, Haviland's employer. Aron asserts that the Exchange would have a keen interest in any such tarnishing of the reputation of a member firm such as Goldman, thus satisfying the "exchange-related" requirement. *See Pearce*, 828 F.2d at 830 ("the Exchange expresses each firm's interest that every other member firm conduct its business in a manner that inspires and warrants public confidence in all members").

We regard this argument as misdirected. Our construction of Rule 600(a) in *Paine* was premised upon avoiding "significant injustice to the reasonable expectations of exchange members," *Paine*, 728 F.2d at 580, consistent with the underlying premise that "'arbitration is a matter of contract.'" *AT&T Technologies*, 475 U.S. at 648 (quoting *United Steelworkers*, 363 U.S. at 582). We concluded that such members might reasonably anticipate that Rule 600(a) would require them to arbitrate disputes that were related to their exchange activities.

The argument advanced by Aron, on the other hand, departs from the focus upon the exchange insider's reasonable

expectation in agreeing to be bound by Rule 600(a), and addresses exclusively the Exchange's interest in the reputational aspects of the dispute. We do not accept this separation of the "exchange-related" concept from the context in which it was announced in *Paine*. We note also that in *Pearce*, in which the Exchange's interest in the reputation of its members was stressed, *see* 828 F.2d at 830, asserted misconduct by the complaining associated member was central to the dispute between the parties. *See id.* at 827. As we indicated in *Paine*, the Exchange's interest in the business conduct of its members may warrant a broader reading of Rule 600(a) in this context, *see Paine*, 728 F.2d at 580 & n.5, but no misconduct by Haviland has been put in issue here.

In addition, we note that associated persons like Haviland contract to arbitrate directly with the Exchange in signing a U-4 registration statement, *see Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651 n.2 (1991), and in doing so undertake an open-ended commitment to be bound by the Exchange's rules, constitution, and bylaws. It was thus within the Exchange's power to impose in Rule 600(a) the all-inclusive protection of the Exchange's reputational interests for which Aron contends. In our view, however, it has not done so.

The overall theme of Aron's appeal is that because Haviland's real dispute is with Goldman, and that dispute must be arbitrated pursuant to Rule 347, the exactly parallel dispute with Aron should be arbitrated pursuant to Rule 600(a). The two rules, however, are distinct in their terms and purposes. The Goldman partners found it advantageous, furthermore, to deal in various commodities and foreign exchange for their own account through a nonmember

affiliate, a choice that was probably compelled by significant commercial and professional considerations, and there is no inherent unfairness in holding them to that election for present purposes. This situation differs materially from one in which the member and nonmember defendants simply occupy different levels of an integrated corporate structure, as was the case in *Fleck* and *Pearce*.

Finally, as the district court noted, "[n]o claim is made by Aron that its membership and activities are so closely tied to those of the [Exchange] member Goldman that it can avail itself of the arbitration provisions relating to Goldman." *Haviland*, 736 F. Supp. at 510 n.2. At a minimum, Aron bore the burden of going forward with such a showing.

Conclusion

The order of the district court denying Aron's motion for a stay of arbitration is affirmed.

WALKER, *Circuit Judge*, dissenting:

Because I believe that NYSE Rule 600(a) and our decisions in *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989), and *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577 (2d Cir. 1984), require the arbitration of Haviland's claim against J. Aron, I would reverse the district court's decision.

Haviland, a registered representative of the New York Stock Exchange and a Goldman vice-president in charge of the Energy Futures and Options Group, alleges that Goldman and J. Aron, an entity with ownership identical to Goldman but without NYSE membership, conspired to interfere with Haviland's execution of his responsibilities to Goldman

clients. According to Haviland, Goldman misrepresented that confidential information Haviland acquired from clients relating to their energy futures and options trading plans would be screened from J. Aron, which trades as a principal in various markets, including the energy futures and options markets. The complaint also alleges that both J. Aron and Goldman attempted to coerce Haviland to divulge confidential client information, and when he did not comply, Goldman reduced his compensation and then fired him.

The majority does not deny that Haviland's dispute with Goldman is arbitrable under NYSE Rule 347, which governs disputes between members of the NYSE and associated persons including disputes arising out of employment relations, but maintains that Haviland's dispute with J. Aron, virtually identical to his claim against Goldman, is not arbitrable under Rule 600(a). In my view, the majority opinion misreads both Rule 600(a) and our previous decisions construing that rule.

Taken alone, the language of Rule 600(a) plainly covers this dispute. Rule 600(a) makes arbitrable any dispute between a non-member and "a member . . . and/or associated person arising in connection with the business of such member . . . and/or associated person in connection with his activities as an associated person." The use of the term "associated person" in the NYSE Rules is "clearly meant to draw on the definition found in the Securities Exchange Act of 1934," including a partner, officer, director, or branch manager of an NYSE member. *See Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 830 (D.C. Cir. 1987); 15 U.S.C. § 78(c)(21); *see also* 15 U.S.C. § 78(c)(18) (excluding clerical and ministerial employees of broker dealers from definition of associated persons).

As a vice-president of Goldman, a NYSE member, Haviland is an "associated person" under Rule 600(a). Haviland's claims against J. Aron place at issue, among other things, "significant aspects" of his employment as an "associated person," including Haviland's performance of his responsibilities as Goldman's employee and Goldman's decision to reduce Haviland's compensation and ultimately terminate his employment. *Fleck*, 891 F.2d at 1053. Because such issues are inseparable from resolution of Haviland's dispute against J. Aron, Haviland's claims are connected with his activities as an associated person and hence arbitrable under Rule 600(a).

This court so reasoned in *Fleck*, decided in 1989, where we held Rule 600(a) to cover post-termination defamation claims by a former employee of E.F. Hutton, an NYSE member, against E.F. Hutton Group, an E.F. Hutton affiliate which was not a member of the NYSE. Fleck's claims against E.F. Hutton Group were identical to his claims against E.F. Hutton. We reasoned that because resolution of the claims against E.F. Hutton required evaluation of Fleck's performance in his employment as an E.F. Hutton broker, they involved "significant aspects of the employment relationship" and were therefore arbitrable under Rule 347. 891 F.2d at 1053. We then found Fleck's claims against E.F. Hutton Group arbitrable under Rule 600(a) "to the same extent" that Fleck's claims against E.F. Hutton were arbitrable under Rule 347. 891 F.2d at 1054. "[M]atters that arose in connection with Fleck's activities as an associated person would also arise in connection with his employment under Rule 347." *Id.*

Fleck did not turn on the fact that Fleck himself worked as a stockbroker, despite the majority's attempt to distinguish

it on this basis. Rather, the ruling was motivated by the fact that Fleck's conduct as an "associated person," E.F. Hutton's employee, was squarely at issue. Because E.F. Hutton Group's defense against defamation was that the statements made were true, a decision maker would have to examine Fleck's performance as E.F. Hutton's employee.

In *Pearce*, decided in 1987, the D.C. Circuit took a similar position. The *Pearce* court found that the claims for defamation and invasion of privacy brought by a branch office manager of E.F. Hutton against E.F. Hutton Group were arbitrable under Rule 600(a). The statements concerned Pearce's supervision of E.F. Hutton's cash management system. Because "cash management—or mismanagement, as the case may be—is squarely within the scope of a [b]ranch [o]ffice [m]anager's activities," 828 F.2d at 831, the court found the claims "connected" to Pearce's duties as an associated person. The *Pearce* court, like the *Fleck* court, thus found the claims arbitrable under Rule 600(a) because the claims and defenses put in issue the activities of the "associated person." 828 F.2d at 832. Notably, the *Pearce* court reached this conclusion notwithstanding the fact that Pearce's duties did not involve trading on the New York Stock Exchange.

The majority tries to distinguish this case from *Fleck* and *Pearce* by arguing that the "issue of the truth of the defamation [in those cases] turned upon the asserted misconduct of the employee, not the nonmember." Slip op. at 15. The distinction, however, is baseless. Although the majority appears to be suggesting otherwise, in neither *Fleck* nor *Pearce* was the misconduct of the employee the central issue. Rather, the claims in both cases concerned allegations of nonmember misbehavior. The claims were nonetheless

arbitrable because the resolution of the dispute, including claims and defenses, placed in issue the associated person's occupational duties and performance.

Here, the essence of Haviland's claims, like those of Fleck and Pearce, is that the defendants J. Aron and Goldman engaged in misconduct that affected Haviland's employment. Resolution of his dispute with J. Aron will involve evaluating Goldman's treatment of Haviland, including reduction in salary and termination, as well as an evaluation of Haviland's performance for Goldman (and Goldman affiliates) as a Goldman employee. It is undisputed that the issue of Haviland's responsibility to protect his Goldman clients falls squarely within the scope of his duties as an "associated person." In my view, then, *Fleck* and *Pearce*, properly read, require us to hold that Haviland's claims against J. Aron are connected to Haviland's activities as an associated person and thus arbitrable.

The majority's position that Haviland's dispute with J. Aron is not arbitrable rests on two basic arguments. First, the majority says that because the language of Rule 600(a) indicates that the associated person has a lesser duty to arbitrate than a member, the "exchange-related" requirement of our 1984 ruling in *Paine Webber* is applicable. Second, the majority contends that Haviland's claim against J. Aron is not "exchange-related," and therefore not arbitrable, because it relates to options trading, not equity trading. I take issue with both arguments.

First, I disagree with the majority's reading of Rule 600(a) to place a narrower duty to arbitrate upon an associated person than on a member. The interpretation is not only irrelevant to the majority's decision to transpose the "exchange-related" requirement to this case, it is also, in my

view, incorrect. The majority omits an "or" in abridging Rule 600(a). The proper reading, as we held in *Fleck*, is that an associated person's claims are arbitrable if they arise "'in connection with [his] business [and/*or*] in connection with his activities as an associated person.' Rule 600(a)." 891 F.2d at 1054. Thus read, the associated person's duty to arbitrate is not narrower than that of a member.

If anything, Rule 600(a) may be read to require an associated person to arbitrate a broader, not narrower, range of claims than a member under Rule 600(a). Rule 600(a) makes arbitrable any dispute between a non-member and "an associated person arising in connection with the business of such member . . . and/or associated person in connection with his activities as an associated person." An associated person, is, by definition, an individual employed by a member. Therefore, Rule 600(a) could be read to require an associated person to arbitrate a claim arising *either* in connection with the business of the member with whom the person is associated *or* in connection with the associated person's activities as an associated person. The member's obligation, by contrast, extends only to claims arising in connection with its business.

I also disagree with the majority's decision that Haviland's claims are not "exchange-related" under *Paine Webber* and therefore not arbitrable. In so finding, the majority is not only forced to distort later holdings in *Fleck* and *Pearce*, but it also chooses a cramped view of "exchange-related." In *Paine Webber*, we found nonarbitrable plaintiff NYSE member's suit against a nonmember bank, Chase Manhattan, and a former Chase employee for fraudulent representations which misled plaintiff into extending credit to a third party. We stated that the NYSE

arbitration provisions governing member-non-member controversies, at least when "the alleged wrongdoer is a non-member," 728 F.2d at 581, should be limited to "controversies arising out of the member's exchange-related business." 728 F.2d at 580.

The majority's apparent conclusion that only a dispute arising out of trading activity on the NYSE can be considered "exchange-related" is overly narrow. As we recognized in *Paine Webber*, the regulation of employment relations at member firms is a core purpose of the NYSE system of self-regulation. The NYSE has a "substantial interest . . . in the sound and proper management of its member firms." *Paine Webber*, 728 F.2d at 181. *See also Pearce*, 828 F.2d at 830 ("the Exchange expresses each firm's interest that every other member firm conduct its business in a manner that inspires and warrants public confidence in all members . . . [,] surely extend[ing] beyond [ ] handling of customer accounts"); *McGinnis v. E.F. Hutton & Co., Inc.*, 812 F.2d 1011, 1014 (6th Cir. 1987) ("We can imagine little which would be of greater concern to the Exchange than the claims by one of its registered members [not working as a broker] that a prestigious brokerage house was involved [in an alleged attempt to induce participation in unlawful activity].") Therefore, disputes raising issues of the quality of internal management and control, including the conduct of employment relations, by NYSE members such as Goldman Sachs, must be considered "exchange-related."

My view that "exchange-related" should include such claims is supported by reasoning in *Paine Webber* itself. The *Paine Webber* court considered to be "exchange-related" under Rule 600(a) a slander claim brought by a member firm against a former registered representative of the member,

unrelated to any trading on the NYSE. *See Ghiron v. Mayr*, 19 A.D.2d 54, 241 N.Y.S.2d 144 (1st Dept. 1963) (per curiam). The slander in *Ghiron* related only to the firm's finances. The *Paine Webber* court nonetheless agreed with the New York court in *Ghiron* that the dispute had been properly subjected to arbitration, because the controversy "arose out of the plaintiff member firm's exchange business and the former representative's employment." 728 F.2d at 581; *see also id.* at 581 n.6.

Second, the majority finding that Haviland's dispute is not "exchange-related" is dependent upon an inappropriate analogy of *Paine Webber* and the instant case. *Paine Webber's* holding that a dispute between a member and a non-member was not arbitrable under Rule 600(a) was a narrow one, easily distinguished from the situation here. In *Paine Webber*, the NYSE had no articulated interest in the dispute between the member and the non-member. The dispute over the nonmember bank's credit reporting was in an area of activity far afield from those, like trading or employment relations, in which the NYSE evinces interest. The conduct of the NYSE member was not at issue, whether or not that conduct might have been "exchange-related;" it was in this context that the court observed that NYSE non-member Chase, accused of fraudulent misrepresentation, was the only alleged "wrongdoer." Here, by contrast, Haviland's dispute requires examination of both the employment practices of an Exchange member, in which the NYSE has a direct interest, and the responsibilities and performance of the "associated person," Haviland, in his job.

Third, the majority's concern with protecting the reasonable expectations of NYSE members and associated persons is misplaced. Haviland's reasonable expectations

would not be disturbed by submitting this claim to arbitration. Haviland signed a U-4 form authorizing the submission of his employment-related claims against Goldman to arbitration under NYSE Rule 347. Although J. Aron was not in existence at that time, Haviland reasonably should have expected that his virtually identical claims in a suit against a wholly-owned affiliate of Goldman might very well be subject to arbitration, as the plaintiff's claims were in *Fleck* and *Pearce*.

Haviland's conduct during this litigation suggests that he was aware that his claims against either Goldman or J. Aron or both might be submitted to arbitration. Although the allegations in the complaint principally concern Goldman, Haviland joined J. Aron as a "co-conspirator." When the district court found the dispute with Goldman to be arbitrable, however, Haviland promptly announced his intention to drop Goldman from the suit and pursue only J. Aron. As a forum shopper, Haviland should not now be heard to claim unfair surprise at the attempt of Goldman's affiliate to obtain arbitration.

Finally, I believe that the majority's narrow view of Rule 600(a)'s coverage is out of step with the strong federal policy favoring arbitration. That policy requires that doubts concerning the scope of an arbitration clause be resolved in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). I agree with the majority that whether a dispute is arbitrable is ultimately a matter of contract. However, courts are to "rigorously enforce" those agreements. *Id.* at 626 (quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985)). Courts are not to "distort the process of contract

interpretation [ ] in order to ferret out the [controversies] inappropriate" for arbitration. *Mitsubishi*, 473 U.S. at 627.

This is particularly the case where, as here, "the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry." *Pearce*, 828 F.2d at 829. Such arbitrators would be well-qualified to resolve Haviland's dispute with J. Aron and the issues of responsibilities to clients, information exchanges in the energy futures and options markets, and the employment conditions imposed by J. Aron's co-conspirator Goldman. I believe, therefore, that we should not strain, as the majority has done, to remove Haviland's dispute from the purview of Rule 600(a).

For the reasons stated above, I respectfully dissent from the majority's decision to affirm the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 26th day of November, one thousand nine hundred and ninety-one.

LEO HAVILAND,
Plaintiff-Appellee,

v

DOCKET NUMBER
90-7460

GOLDMAN, SACHS & COMPANY,
Defendant,

J. ARON & COMPANY,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant, J. Aron & Company.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEO HAVILAND,

Plaintiff,

— against —

GOLDMAN, SACHS & CO. and J. ARON & CO.,

Defendants.

89 CIV. 8463 (LBS)

OPINION

May 8, 1990

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HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

Plaintiff Leo Haviland brings suit against his former employer Goldman, Sachs & Co. ("Goldman") and its affiliate J. Aron & Co. ("Aron") alleging injury caused by a pattern of racketeering activity that included mail fraud, wire fraud and attempted extortion. The defendants now seek an order pursuant to section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, staying these judicial proceedings pending the completion of arbitration. We grant the motion to stay the claims asserted against defendant Goldman and deny the motion to stay the claims asserted against defendant Aron.

Background

Leo Haviland joined Goldman in 1979 and worked as a vice president in Goldman's Energy Futures and Options Group during the relevant time period and until his termination in February 1989. Haviland earned commissions for Goldman by trading energy futures and options on energy futures on behalf of large refining and marketing firms, energy producers, and oil trading companies. These trades were executed predominantly on the International Petroleum Exchange in London; none of these trades were executed on the New York Stock Exchange ("NYSE").

Haviland's claims involve the alleged conflicting interests of Goldman's Energy Futures and Options Group and defendant Aron, a partnership consisting of all Goldman partners. In 1984, Aron began trading as a principal in the energy futures, options, forwards and physical delivery markets. Haviland alleges that the confidential information he acquired from his clients about their future trading plans was tremendously valuable to Aron. For example, if Aron knew that one of Haviland's clients intended to purchase a

substantial amount of oil, Aron could attempt to enter the market in advance of Haviland's client and profit from that information.

Haviland asserts that from April, 1984 to Spring, 1987, Goldman made explicit, but false, promises that it would erect a "Chinese Wall" so that Aron would not obtain any confidential customer information from Haviland's group. Then, from July, 1987 to January, 1989, both Goldman and Aron allegedly attempted to extort Haviland into divulging confidential client information to Aron. Haviland claims that he was denied appropriate salary increases and eventually summarily dismissed because he refused to divulge the requested information. In his complaint, Haviland asserts claims against both Goldman and Aron for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d), and common law fraud.

The parties do not dispute that in September 1981, Haviland executed a Form U-4, captioned "Uniform Application for Securities Industry Registration" ("U-4"). Paragraph 5 on page 4 of the U-4 states:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

Affidavit of Robert J. Katz, Exhibit A. In response to Question 8, Haviland applied for registration with the NYSE, the American Stock Exchange and the National Association of Securities Dealers.

The parties also do not dispute that Haviland is a registered representative of the NYSE, that defendant Goldman is a member organization of the NYSE and that

defendant Aron is not a member. Different NYSE rules apply to controversies involving member organizations of the NYSE and to controversies involving non-members. NYSE Arbitration Rule 347, which might apply to Haviland's claims against Goldman, states:

> Any controversy *between a registered representative and any* member or *member organization arising out of the employment or termination of employment* of such registered representative by and with such member or member organization shall be settled by arbitration, at the insistence of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

2 N.Y.S.E. Guide (CCH) ¶ 2347 (Sept. 1988) (emphasis added). NYSE Rule 600(a), which might apply to Haviland's claims against Aron, states:

> Any dispute, claim or controversy *between a* customer or *non-member and a* member, allied member, member organization and/or *associated person arising in connection with the business of such* member, allied member, member organization and/or *associated person in connection with his activities as an associated person* shall be arbitrated under the Constitution and Rules of the [NYSE] as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

2 N.Y.S.E. Guide (CCH) ¶ 2600 (May 1988) (emphasis added). Haviland is clearly an associated person within the meaning of Rule 600(a). *See Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1054 (2d Cir. 1989) (citing the definition in the Securities Exchange Act of 1934); 15 U.S.C. §§ 78(c)(a)(18), 78(c)(a)(21) (1982) (including an employee of a member in the definition of a person associated with a member).

Haviland argues that although he was a registered representative with the NYSE, he never acted in that capacity and never executed any trades on the NYSE. Haviland claims that he could have performed his job and traded on various commodities exchanges even if he had not registered with the NYSE and even if Goldman were not a NYSE member organization. *See* Affidavit of Leo Haviland. The defendants respond that even if registration were not required by the NYSE, Goldman required as a policy matter that all employees in Haviland's position complete such registration. *See* Reply Affidavit of David B. Ford. Haviland retorts that Goldman did not enforce that policy, noting that other members of his group were not so registered.

For the purposes of this motion, we need not resolve the parties' dispute over the bona fide nature of Goldman's policy requiring registration with the NYSE. Haviland does not claim that his decision to execute the U-4 was involuntary,[1] and the parties do not dispute that Haviland could have performed exactly the same job without executing that written agreement. The issue before this Court is whether Haviland's claims against Goldman and Aron fall within the scope of the written arbitration rules of the NYSE.

Discussion

By signing the U-4 application, Haviland voluntarily agreed to comply with the rules of the NYSE. Arbitration agreements are contractual obligations which are governed by general principles of contract interpretation. The federal

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1 After oral argument, the defendants' attorney mailed to the Court a copy of an opinion in *Roe v. Kidder, Peabody & Co., Inc.*, 88 Civ. 8501 (S.D.N.Y. April 18, 1990). We find that case inapplicable because Haviland does not claim that he was fraudulently induced into executing the U-4.

policy supporting arbitration requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Fleck*, 891 F.2d at 1050.

We first consider defendant Goldman's motion. Other courts have liberally construed the requirement of NYSE Rule 347 that the claims asserted must "aris[e] out of the employment or termination of employment." *See Fleck*, 891 F.2d at 1053 (NYSE Rule 347 requires arbitration of tort claims that "involve significant aspects of the employment relationship" even where the torts are committed after termination of employment; modifying *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78 (2d Cir. 1983)); *Aspero v. Shearson American Express, Inc.*, 768 F.2d 106 (6th Cir.) (tort claim arising after employment is arbitrable under NYSE Rule 347 if "resolution of the claim depends upon evaluation of a party's performance either as a broker or an employer of brokers during the time of the contractual relationship"), *cert. denied*, 474 U.S. 1026 (1985); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984) ("[T]he language 'arising out of' contained in Rule 347 requires arbitration of tort as well as contract claims which involve significant aspects of the employment relationship . . ."); *see also Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986); *Henderson v. Tucker, Anthony and RL Day*, 721 F. Supp. 24 (D.R.I. 1989); *Cullen v. Paine Webber Group, Inc.*, 689 F. Supp. 269, 281-82 (S.D.N.Y. 1988).

In *McGinnis v. E.F. Hutton & Co., Inc.*, 812 F.2d 1011 (6th Cir.), *cert. denied*, 484 U.S. 824 (1987), the plaintiff executed a U-4 and registered with the NYSE, but was

employed at the time of her termination as an operations manager, not as a broker. In her complaint, the plaintiff asserted various common law contract and tort claims against her former employer and alleged that she was discharged for her refusal to participate in unlawful activity related to an audit. The Sixth Circuit held that even though the plaintiff was not a broker and the dispute did not relate to stock exchange business, NYSE Rule 347 required that she submit her claims to arbitration.

We agree with the Sixth Circuit's broad interpretation of the scope of NYSE Rule 347. It is clear that Haviland is a registered representative and that his claims against Goldman do "aris[e] out of" his employment and termination of employment with a member organization of the NYSE. The plain language of Haviland's written agreement does not require that Haviland's employment duties directly involve the NYSE or that his claims relate to NYSE activity. The torts alleged were committed while Haviland worked for Goldman and do involve "significant aspects of the employment relationship." We therefore grant Goldman's motion for a stay of these judicial proceedings pending arbitration.

We next consider defendant Aron's motion. NYSE Rule 600(a), not NYSE Rule 347, applies to claims asserted by Haviland, an associated person, against Aron, a non-member, and limits the scope of arbitrable issues to claims arising "in connection with [Haviland's] business . . . [or] in connection with [Haviland's] activities as an associated person." The Second Circuit held in *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577, 580 (2d Cir. 1984), that "[t]he arbitration provisions found in the NYSE Constitution and Rules governing member/non-

member controversies should be limited, at least in cases such as the instant one in which the alleged improper conduct is on the part of the non-member, to controversies arising out of the member's exchange-related business." Otherwise, the court reasoned, the NYSE rules "would require every exchange member, at the insistence of a non-member, to submit to exchange arbitration every dispute it has with any entity in the world, no matter what the subject matter." *Id.; see also Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987) (applying the "exchange-relatedness" test of *Paine, Webber*, but not deciding whether NYSE Rule 600(a) requires such limitation).

We note that the alleged improper conduct in this case, as in *Paine, Webber*, is on the part of the non-member.[2] We must decide, therefore, whether Haviland's claims against Aron arise out of Haviland's exchange-related business. The predicate RICO acts and common law fraud alleged involve Haviland's activities trading energy commodities on exchanges other than the NYSE, and Aron concedes that Haviland could perform the same activities without registering with the NYSE. Despite the federal policy favoring arbitration, to require arbitration of these claims would extend the parties' arbitration agreement beyond any reasonable understanding of their intentions. We find that Haviland's claims here do not relate to any exchange-related business. *Compare Pearce*, 828 F.2d at 831-32 (allegedly improper cash management practices by branch office manager are exchange-related) *with Paine, Webber*, 728 F.2d

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2 No claim is made by Aron that its membership and activities are so closely tied to those of the NYSE member Goldman that it can avail itself of the arbitration provisions relating to Goldman. We render no opinion on the validity of such a claim were it advanced.

at 581 (credit inquiry and extension of credit prior to securities transactions not involving the NYSE are not exchange-related activities).

Aron argues that the Second Circuit in *Fleck* held that the scope of NYSE Rule 600(a) is identical to the scope of NYSE Rule 347. Aron's argument is based on a single sentence in *Fleck*: "[w]e hold that the dispute with the Group [a non-member] is arbitrable to the same extent as the dispute with the Company [a member]; matters that arose in connection with Fleck's activities as an associated person would also arise in connection with his employment under Rule 347." *Fleck*, 891 F.2d at 1054. We believe that the context of the Second Circuit's decision makes it clear that rather than stating a general rule about the scope of Rule 600(a), the court's holding quoted above referred only to the facts in that case where the exchange-relatedness of the conduct was not at issue. The plaintiff in *Fleck* asserted tort claims against the defendants for statements concerning the reasons for the plaintiff's termination of employment. The plaintiff had been employed by the defendants as a broker, and the statements at issue related to his character and performance as a broker. We do not construe the court's holding in *Fleck* as a universal proposition that all matters that arise in connection with employment activities necessarily arise in connection with exchange-related activities. Indeed, the facts of this case provide an example where conduct may be related to employment, but not involve exchange-related activity. While the court in *Fleck* did not explicitly apply the exchange-related test of *Paine, Webber*, it cited *Paine, Webber* with approval and implicitly concluded that Fleck's activities were exchange-related.

Conclusion

We grant defendant Goldman's motion to stay these judicial proceedings pending arbitration and deny defendant Aron's motion for a similar stay. At oral argument, Haviland's counsel stated that if the Court reached this holding, Haviland would voluntarily discontinue his claims against Goldman. The parties are directed to submit to the Court in writing by May 21, 1990 a proposed discovery cut-off date for the claims against Aron.

SO ORDERED.

Dated: May 8, 1990
New York, New York

/s/
U.S.D.J.

1. I hereby certify that I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in Question 8 and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final.

3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-

laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process of pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in

said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

¶ 2347 Controversies As to Employment or Termination of Employment

Rule 347. Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Amendments.

April 17, 1958.

April 3, 1975; effective May 1, 1975.

¶ 2600 Arbitration

Rule 600. (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where—having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code—such dispute, claim or controversy is not a proper subject matter for arbitration.

NYSE Member Organizations Listed as Having Non-Member Affiliates*

Advest, Inc.
BT Brokerage Corporation
Bateman Eichler, Hill Richards, Incorporated
Bear Stearns & Co. Inc.
Bear Stearns Specialist Inc.
Blunt Ellis & Loewi Incorporated
Broadcort Capital Corp.
Brown (Alex.) & Sons, Inc.
Brown Brothers Harriman & Co.
Brown & Company Securities Corporation
Dain Bosworth, Incorporated
Dean Witter Reynolds Inc.
Deutsche Bank Capital Corporation
Dillon Read & Co. Inc.
Donaldson, Lufkin & Jenrette Securities Corporation
First Boston Corporation (The)
First Options of Chicago, Inc.
Furman Selz Mager Dietz & Birney Incorporated
Goldman, Sachs & Co.
Goldman Sachs Money Markets, Inc.
Gruntal & Co. Incorporated
Howard, Weil, Labouisse, Friedrichs Incorporated
Icahn & Co., Inc.
JJC Specialist Corporation
Janney Montgomery Scott Inc.
Kidder, Peabody & Co. Incorporated
Lawrence (C.J.) Morgan Grenfell Inc.
Legg Mason Wood Walker, Incorporated

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* Sources: Member Organizations, N.Y.S.E. Guide (CCH) and *Directory of Corporate Affiliations* (National Register Publishing Co. 1991)

Lovett Underwood, Neuhaus & Webb Inc.
Manufacturers Hanover Securities Corporation
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Merrili Lynch Specialists Inc.
Morgan (J.P.) Securities, Inc.
Morgan, Keegan & Company, Inc.
Morgan Stanley & Co. Incorporated
Nikko Securities Co. International, Inc. (The)
Nomura Securities International, Inc.
Norstar Brokerage Corporation
PaineWebber Incorporated
PaineWebber Specialist Inc.
Piper, Jaffray & Hopwood Incorporated
Prescott, Ball & Turben, Inc.
Prudential-Bache Securities Inc.
Quick & Reilly, Inc.
Raymond, James & Associates, Inc.
Refco Securities, Inc.
Robinson-Humphrey Company, Inc.
Rotan Mosle Inc.
Rothschild Inc.
Salomon Brothers Inc
Schwab (Charles) & Co., Inc.
Shearson Lehman Brothers Inc.
Smith Barney, Harris Upham & Co. Incorporated
Standard & Poor's Securities, Inc.
Wagner Stott Clearing Corp.